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IN THE
Supreme Court of the United States

JAY SHAWN JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court of California

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Introductory Statement

This case was initially heard in the October, 2003 Term. However, on May 3, 2004, this Court dismissed for want of jurisdiction inasmuch as the petitioner had raised additional, potentially dispositive state law claims that had been reached neither by the intermediate Court of Appeal nor by the California Supreme Court, whose judgment was the subject of the writ of *certiorari* that had issued. *Johnson v. California*, ___ U.S. ___, 124 S. Ct. 1833 (2004) (*per curiam*).

On remand following that dismissal, the California Court of Appeal rejected petitioner's state law arguments and the California Supreme Court denied discretionary review. Petitioner again asked this Court to review the California Supreme Court's "*Wheeler/Batson*" ruling, which had merged into the new, now-final state court judgment. This Court granted the writ. *Johnson v. California*, 73 U.S.L.W. 3396 (U.S. Jan. 7, 2005).

When the matter was heard in the last Term, present *amici* submitted a brief in support of Petitioner. In the intervening period, there have been no decisions of the California Supreme Court that materially affect the issues presented by that Court's 2003 decision in this case, *People v. Johnson*, 30 Cal. 4th 1302 (2003). Accordingly, *amici* reprint, in the following pages, the brief they previously submitted in the October, 2003 Term.

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Interest of *Amici*[*]

Amici are non-profit organizations that seek to protect and further constitutional and statutory rights, including in particular the right to be free from racial discrimination in any contacts with the criminal justice system. More detailed descriptions of the *amici* and their interest in this matter are contained *infra* at Appendix A.

Summary of Argument

This Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) was intended to create a workable mechanism to prevent racial discrimination through peremptory strikes from infecting criminal trials. *Batson* replaced the "crippling burden of proof" necessary to show discrimination in the use of peremptory challenges that had been erected by the ruling in *Swain v. Alabama*, 380 U.S. 202 (1965), with the now-familiar three-part procedure: *First*, the defendant must establish a *prima facie* case by showing facts and circumstances that "raise an inference" of discrimination; *second*, once the *prima facie* case has been established, the prosecutor must offer a facially nondiscriminatory reason for the challenged strike; and *third*, after the prosecutor articulates such a reason, the defendant may offer additional evidence, either to demonstrate that the proffered justification is pretextual or to meet in any other way his burden of persuading the trier of fact that the strike was motivated by discriminatory purpose. The trial court determines whether discrimination occurred by considering all relevant evidence offered by any party at any stage.

This matter involves what showing must be made to establish a *prima facie* case — a subject that the Court has not

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[*] Letters of consent to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, made any monetary contribution to its preparation.

revisited since *Batson*. Lower federal courts consistently interpret the *prima facie* burden to require that a defendant prove only facts that support an inference of discrimination.

Historically and in the decision below, however, the California Supreme Court has required a substantially greater evidentiary showing at the *prima facie* case stage. Both before and after *Batson*, that Court has held that proof sufficient for an inference of discrimination "is not conclusive," and no *prima facie* case exists unless the defendant proves more, *i.e.*, a "strong likelihood" of discrimination.

The Supreme Court of California sought to justify its *prima facie* case standard by misreading this Court's Title VII cases. But Title VII, like *Batson*, imposes only a "minimal" burden on plaintiffs at the *prima facie* stage. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

The higher standard for the *prima facie* case that was applied by the courts below is contrary to *Batson* and inadequate to protect defendants' Fourteenth Amendment rights, as the facts of this case demonstrate. Petitioner clearly presented sufficient proof to support an inference that the prosecution's strikes were discriminatory: Petitioner is an African American; the prosecutor used peremptory challenges to remove *all* African Americans from the jury; a disproportionate number of the prosecutor's peremptory challenges were lodged against African-American venirepersons; the prosecution asked no questions of the African Americans on the venire before seeking to strike them; and the circumstances of the offense had racial overtones (the victim was the child of Petitioner's white girlfriend).

This Court should disapprove the standard enunciated by the Court below because, as detailed herein, it impedes the discovery and eradication of racial discrimination that was the purpose of *Batson*.

ARGUMENT

The California Supreme Court's Decision and the Procedure that Court has Established for Trial Court Consideration of Objections to Peremptory Challenges as Discriminatory Departs from this Court's Ruling in *Batson* and is Inadequate to Safeguard the Constitutional Rights *Batson* was Intended to Protect

A. The *Batson*[1] Decision

1. *Strauder* and *Swain*: The Onerous Burden of Proof

Although this Court announced nearly 125 years ago that excluding individuals of a criminal defendant's race from serving on his jury violates his right to equal protection under the Fourteenth Amendment, *Strauder v. West Virginia*, 100 U.S. 303 (1879), the exclusion of African-American prospective jurors remained a notorious feature of criminal trials throughout most of the 20th Century. This was in part because *Strauder*'s general rule lacked any specific mechanism for enforcement at trial until 1965, when the Court decided *Swain v. Alabama*, 380 U.S. 202 (1965).

This Court's decision in *Swain* offered the first guidance to lower courts seeking to determine whether the use of peremptory challenges for the purposeful exclusion of African Americans violated the Fourteenth Amendment. But *Swain*'s requirement of systemic proof created a virtually insuperable barrier for defendants alleging discrimination in the prosecutor's use of peremptory challenges and failed to ameliorate the very problem it was meant to solve. *Swain* demanded that the defendant show that the prosecution, "whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes . . . with the result that no Negroes ever serve on

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

petit juries . . . ." *Swain*, 380 U.S. at 223. As the Court later put it, the "crippling burden of proof"[2] established in *Swain* represented a stumbling block in this Court's "unceasing efforts to eradicate racial discrimination."[3]

Twenty years after *Swain* was decided, racial discrimination in jury selection remained a fixture in many American courtrooms.[4] In fact, in the two decades immediately following *Swain*, not a single federal court made a finding that any peremptory challenges had been exercised in a discriminatory manner.[5] The reality, of course, was that African Americans were virtually openly excluded from participation in a system of justice purporting to promise equality and fairness. The gulf between constitutional promise and everyday practice bred cynicism and distrust in the criminal justice system.

Against this backdrop, the Court abandoned *Swain* in *Batson*, largely because it concluded that the formidable *Swain*

[2] *Batson*, 476 U.S. at 92.

[3] *Id.* at 85.

[4] This was documented in several successful *Swain* challenges in the late 1980's and the 1990's. *See, e.g., Horton v. Zant*, 941 F.2d 1449, 1455-60 (11th Cir. 1991) (*Swain* test satisfied where evidence showed prosecution struck 90% of African-American jurors in capital cases over a seven-year period, in addition to other evidence showing prosecutor took steps to lessen minority participation in jury system); *Miller v. Lockhart*, 65 F.3d 676, 680-82 (8th Cir. 1995) (*Swain* test satisfied where prosecutor used ten strikes against African-American jurors in instant case and other evidence showed African Americans excluded peremptorily in large numbers in five-year period preceding Miller's trial); *Jones v. Davis*, 835 F.2d 835 (11th Cir. 1988) (testimony of six practicing attorneys showed black jurors routinely struck by prosecutors in jurisdiction; *Swain* standard satisfied).

[5] *See* JEFFREY ABRAHAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 134 (1994).

standard was insulating discriminatory conduct from judicial remedy.[6] The *Batson* Court recognized that the exclusion of even a single African American from a jury because of race violated the Fourteenth Amendment. It established a framework intended to lower *Swain*'s virtually insurmountable proof requirements to make it possible to demonstrate that discrimination had occurred in a single trial, or with respect to a single peremptory strike.[7] This reform of the *Swain* standard was intended by the Court also to restore public faith in the criminal justice system among criminal defendants, prospective jurors, and the public generally.[8]

[6] Indeed, *Swain*'s author, Justice White, wrote in his concurring opinion in *Batson*: "It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs." 476 U.S. at 101.

[7] "The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike *any* black juror because of his race." *Batson*, 476 U.S. at 99 n.22 (emphasis added).

[8] "'The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.'" *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922)). "Discrimination in the jury selection process undermines the justice system, and, thereby, the whole of our society." *Ramseur v. Beyer*, 983 F.2d 1215, 1225 (3d Cir. 1992); *see Batson*, 476 U.S. at 86 ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge . . . Those on the venire must be 'indifferently chosen' to secure the defendant's right under the Fourteenth Amendment . . . .") (citation omitted); *id.* at 87 (prospective juror stricken because of race suffers unconstitutional discrimination).

2. The *Batson* Holding

In *Batson*, this Court set forth the now-familiar three-part procedure for establishing discriminatory use of peremptory challenges that has been applied in thousands of criminal cases:

> At the first stage, the defendant must establish a *prima facie* case by showing that: (a) he is a member of a cognizable racial group, (b) the prosecution has exercised peremptory challenges to strike veniremembers of the defendant's race from the jury, and (c) "these facts and any other relevant circumstances *raise an inference* that the prosecutor used [peremptory strikes] to exclude the veniremen from the petit jury on account of their race." *Batson*, 476 U.S. at 96 (emphasis added).[9]

As the *Batson* Court recognized, one relevant circumstance is that peremptory challenges "permit[] 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).[10] This Court also offered a non-exhaustive list of other potentially pertinent circumstances, including a pattern of strikes against jurors of a cognizable group, and questions and statements during *voir dire* by the proponent of the peremptory challenge. *Id.* at 97.

At the second stage, the burden shifts to the prosecution to offer a race-neutral reason for its contested strikes. *Id.* The

[9] *Cf. Powers v. Ohio*, 499 U.S. at 402, 415 (extending *Batson* to permit defendant to challenge discriminatory use of peremptory strikes against venire members not of the defendant's own race).

[10] The Court in *Batson* relied upon long-settled principles developed in cases involving constitutional challenges to the composition of jury *venires* in fashioning the *prima facie* case standard that it enunciated for challenges to the use of peremptory strikes: the "combination of factors in the empaneling of the petit jury, *as in the selection of the venire*, raises the necessary inference of purposeful discrimination." 476 U.S. at 96 (emphasis added).

proponent of the strike may not rely on the "assumption — or [an] intuitive judgment — that the [excluded venire members] would be partial to the defendant because of their shared race." *Id.* Neither may the proponent rebut a *prima facie* case by simply denying a discriminatory motive or "affirming [its] good faith in making individual selections." *Id.* at 98 (citations omitted). Rather, the strike's proponent must articulate a race-neutral reason related to the particular case being tried. *Id.*

However, under *Batson*, the proponent's explanation "need not rise to the level justifying exercise of a challenge for cause." *Id.* at 97. In *Purkett v. Elem*, 514 U.S. 765 (1995), the Court further explained that the facially valid reason for striking a prospective juror offered by the strike's proponent at the second stage of the *Batson* procedure need not be "persuasive, or even plausible" because a "'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.* at 768-69. *See also Hernandez v. New York*, 500 U.S. 352 (1991).

Purkett significantly lowered the bar for parties seeking to rebut a *prima facie* case: any reason not facially race-based is acceptable at this stage. This lowering of the bar practically insures that courts will reach the third stage of *Batson* and thus helps explain why most rulings on the existence of discrimination in peremptory strikes are made at the third stage.

At the third stage, *Batson* requires courts to decide whether the defendant has indeed established that the prosecution purposely used its peremptory strikes in a racially discriminatory manner. *Batson*, 476 U.S. at 98. At this stage, the court is to consider all the evidence before it, including the evidence offered to make out the *prima facie* case and the proffered race-neutral reason for the strikes, as well as any additional relevant circumstances, and determine whether the prosecution's reasons are valid or whether they are merely pretext for racial discrimination. *See Purkett*, 514 U.S. at 768.

3. The Federal Courts Consistently Interpret *Batson* as Requiring, at Stage 1, no more than a Showing of Facts from which a Court might Infer Discriminatory Use of Peremptory Challenges by the Prosecutor in order to Trigger the Prosecutor's Obligation to Give Reasons for Strikes

The State of California supported a grant of review in this case because the Ninth Circuit, which hears appeals from California federal District Court *habeas corpus* decisions, has rejected the California Supreme Court's requirements for establishing a *prima facie* case at Stage 1 of the *Batson* procedure. The Ninth Circuit holds that the state court's formulation does not afford criminal defendants the protection to which they are entitled under the Fourteenth Amendment. See *infra* pp. 14-15 & n.23 (discussing *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000), and similar cases). The Ninth Circuit does not stand alone in its view of the *prima facie* case burden. Rather, the California Supreme Court's interpretation of the *prima facie* case under *Batson* is inconsistent with the understanding of each of the federal circuits to have addressed the issue.[11]

While the courts of appeals' precise implementation of the *prima facie* case has necessarily depended on the facts and circumstances of individual cases, none of the federal circuits has described the initial burden in a *Batson* challenge to be as onerous as the formulation of the California Supreme Court.

The Eleventh Circuit, like the Ninth Circuit, has expressly rejected the California view, holding that the "strong likelihood" formulation imposes a burden on the objecting party that is impermissibly "higher than *Batson*'s."[12] The

[11] The D.C. Circuit has not had occasion to address the quantum of proof necessary to establish a *prima facie* case under *Batson*.

[12] *King v. Moore*, 196 F.3d 1327, 1334 (11th Cir. 1999) (rejecting a pre-*Batson* state standard for a *prima facie* showing that

Eleventh Circuit has held that a trial court should proceed to the second stage of the three-part *Batson* procedure whenever it has a "reasonable suspicion" of discrimination.[13]

The other courts of appeals have adopted similar formulations of the modest requirements for a *prima facie* case under *Batson*. Thus, the First Circuit has stated that the *prima facie* burden is "not onerous," and that the objector need only show "circumstances sufficient . . . to raise an inference" of discrimination.[14] The Second Circuit has held that the objecting party has the "minimal burden" to show that the "circumstances surrounding the peremptory challenges raise an inference of discrimination."[15] The Third Circuit has said that the *prima facie* case requires "circumstantial evidence tending to support such an inference [of discrimination]" and reasoned that the "evidence . . . [need] not mandate a conclusion that discrimination occurred, but . . . [need only provide] sufficient reason to believe that discrimination may have been at work

required a "strong likelihood" of discrimination as "higher than *Batson*'s" but concluding that the defendant had failed to make out a *prima facie* showing under the proper *Batson* standard) (citing *Neil v. State*, 457 So. 2d 481, 486-87 (Fla. 1984)).

[13] *United States v. Allen-Brown*, 243 F.3d 1293, 1298 (11th Cir. 2001) ("The '*prima facie*' requirement of *Batson* is not simply a limit on the court's intrusion into counsel's thought processes; it also compels the trial court to act if it has a reasonable suspicion that Constitutional rights are being violated in its presence.").

[14] *United States v. Escobar-de Jesus*, 187 F.3d 148, 164-65 (1st Cir. 1999) (quoting *United States v. Bergodere*, 40 F.3d 512, 516 (1st Cir. 1994)).

[15] *Overton v. Newton*, 295 F.3d 270, 277, 279 n.10 (2d Cir. 2002); *see also Barnes v. Anderson*, 202 F.3d 150, 155-56 (2d Cir. 1999) (stating that the first step of a *Batson* inquiry "*merely* requires the movant to 'show that the circumstances raise an inference of racial discrimination'" (quoting *United States v. Diaz*, 176 F.3d 52, 76 (2d Cir. 1999) (emphasis added)).

here to require the state to come forward with an explanation of its actions."[16]

The Fourth Circuit, while not directly deciding the question because the *Batson* claim was rejected by the trial court at the third stage of the process, described the defendant's burden at the first stage as being "to raise at least an inference that the Government used its strikes to exclude potential jurors based on their race."[17] Similarly, the Fifth Circuit has held that "a party is required to show that the circumstances surrounding the peremptory challenges raise an inference of purposeful discrimination."[18]

The Seventh Circuit has explained that "To establish a *prima facie* case for purposeful discrimination under *Batson*, [the defendant] must . . . point to facts and circumstances raising an inference that the potential jurors were excluded because of race."[19] The Eighth Circuit most recently phrased the standard as requiring a "showing [of] circumstances that

[16] *Johnson v. Love*, 40 F.3d 658, 665-66 (3d Cir. 1994) (alternative holding).

[17] *United States v. Grimmond*, 137 F.3d 823, 834 (4th Cir. 1998).

[18] *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 561 (5th Cir. 2001). In that case, the Fifth Circuit refused to disturb the trial court's rejection of the *Batson* objection at the *prima facie* stage where the objector presented no more than the "scant facts" that four white jurors had been stricken peremptorily, even though the Court of Appeals identified other circumstances that could have been presented to the trial court that "might have made a more convincing showing," *id.* at 562-63.

[19] *United States v. Cooper*, 19 F.3d 1154, 1159 (7th Cir. 1994). *See also Mahaffey v. Page*, 162 F.3d 481, 484 (7th Cir. 1998) ("*Batson* requires us to look to all the relevant facts and circumstances in assessing whether an inference of discrimination should arise.").

give rise to a reasonable inference of racial discrimination."[20]

The Sixth and Tenth Circuits have applied the *Batson* "inference" standard in a manner obviously contrary to the approach of the court below by finding a *prima facie* case to be established in circumstances where the only member of a particular group in the venire was struck.[21]

[20] *United States v. Wolk*, 337 F.3d 997, 1007 (8th Cir. 2003) (quoting *Simmons v. Luebbers*, 299 F.3d 929, 941 (8th Cir. 2002) (no error in trial court ruling that evidence limited to single fact that three blacks were struck from jury did not amount to *prima facie* showing), *cert. denied sub nom. Roper v. Simmons*, 123 S. Ct. 1582 (2003).

[21] *United States v. Mahan*, 190 F.3d 416, 424-25 (6th Cir. 1999) (holding that the government had "more than sufficient[ly]" established a *prima facie* case where a white defendant charged with a hate crime had struck the only potential black juror, explaining that "[t]here is simply no requirement that the government establish the existence of a pattern of discrimination"); *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 854 (10th Cir. 2000) ("Ms. Heno met her *prima facie* case by showing that Sprint used a peremptory to strike the only black juror on the panel."); *United States v. Joe*, 8 F.3d 1488, 1499 (10th Cir. 1993) ("We conclude that the defendant established a *prima facie* case of purposeful discrimination because Joe is a member of a cognizable racial group, Native Americans, and the prosecutor's use of one peremptory challenge to strike Dawn Ferguson, the only Native American juror on the venire, raised an inference that Dawn Ferguson was excluded on account of her race.").

The Second, Third, Seventh and Eighth Circuits have found *prima facie* cases to be established where all or nearly all members of a particular group in the venire were struck. *See Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998) ("the fact that the government tried to strike the only three blacks who were on the panel constitutes a sufficiently dramatic pattern of actions to make out a *prima facie* case"); *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993) (*prima facie* case established where prosecutor exercised three

B. The California Supreme Court Ruling Departs from *Batson* and Rests on Flawed Interpretations of this Court's Jurisprudence

1. The California Court's Tortured Reading of *Wheeler* and *Batson* Produces a Standard Closer to *Swain*'s than *Batson*'s

The California Supreme Court's application of *Batson* and *People v. Wheeler*, 22 Cal. 3d 258 (1979), in the ruling below more closely approaches the discarded *Swain* burden of proof than it does the *Batson* standard for establishing a *prima facie* case. The decision below rests on the premise that "reasonable inference" and "strong likelihood" (both phrases were used in *Wheeler*), are synonymous with each other and with the "inference" standard articulated in *Batson*. *See People v. Wheeler*, 22 Cal. 3d at 280-81; *People v. Johnson*, 30 Cal. 4th 1302, 1312, 1313, 1318 (2003) ("*Wheeler*'s standard for establishing a *prima facie* case . . . is, and always has been, compatible with *Batson*. It merely means that to state a *prima facie* case, the objector must show that it is *more likely than not*

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of four peremptory challenges to strike black jurors, allowing only one black on otherwise all-white jury); *United States v. Williams*, 272 F.3d 845, 862 (7th Cir. 2001) ("Because the government excluded all four African-American members of the jury pool, the district court did not err in requiring the government to state a race-neutral explanation for its exercise of peremptories for these jurors."); *United States v. Sowa*, 34 F.3d 447, 452 (7th Cir. 1994) ("The government easily made its *prima facie* case that the peremptory challenges were motivated by race; each and every black venireperson was challenged."), *cert. denied*, 513 U.S. 1117 (1995); *United States v. Johnson*, 873 F.2d 1137, 1140 (8th Cir. 1989) (*prima facie* case established where, although two African-American venire members were seated on the jury, "the Government struck black veniremen at a disproportionate rate and struck blacks who did not respond during voir dire but did not strike whites who similarly did not respond.").

the other party's peremptory challenges [were racially discriminatory.]") (emphasis added). The California Supreme Court's attempt to equate *Batson*'s "inference of discrimination" with a showing that "it is more likely than not" that discrimination occurred simply cannot be squared with the well-established meaning of the words that it is using.

In California evidentiary law, an "inference" is "a deduction of a fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (CAL. EVID. CODE § 600; *see also* BLACK'S LAW DICTIONARY 778 (6th ed. 1990) (defining inference as "[a] logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts")). There is no suggestion in the statute or the definition that any specific quantum of evidence is required to trigger the logical deduction. "Strong likelihood," on the other hand, though not defined by statute, is a standard that California appellate courts have recognized is not easy to meet. *See, e.g.*, *People v. Buckley*, 53 Cal. App. 4th 658, 663 n.17 (Ct. App. 1997) (noting that "the 'strong likelihood' phrase has been repeated often by the [California] Supreme Court" and that "*the phrase conveys the clear message that the test is not an easy one* (a message we take to heart in the present case)" [in which the majority affirmed the trial court's refusal to find that the defendant had made out a *prima facie* case of discriminatory peremptory challenges]) (emphasis added).

Yet, in the present case, the California Supreme Court equates "inference" with "strong likelihood" in a clearly incorrect reading of *Batson*: "*Batson* permits a court to require the objector to present, not merely 'some evidence' permitting the inference, but 'strong evidence' that makes discriminatory intent more likely than not if the challenges are not explained." *Johnson*, 30 Cal. 4th at 1315, 1316. This interpretation simply

flies in the face of *Batson*. No federal court interpreting *Batson* has ever asserted that the opponent of the peremptory strike must do anything more than establish an "inference of discrimination" at the *prima facie* stage.[22] As one federal court explained, *Batson*'s requirement that the opponent show an "inference of discrimination" means just that and nothing more:

> It is sufficient to recognize that the clearly established governing legal rule pertaining to the *prima facie* burden announced in *Batson* is simply to be taken at face value: an inference of racial discrimination satisfies a prima facie case. Although inferences of racial discrimination defy standardization or quantification, as implicitly recognized by *Batson*, they are nonetheless self-evident and the subject of good common sense. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978) (commenting in the context of a Title VII action that inferences of racial discrimination are to be drawn in "light of common experience"); *see also* 4 Leonard B. Sand, et al., Modern Federal Jury Instructions ¶ 75.01 (1998) (jurors are charged that "[i]n drawing inferences, [they] should exercise [their] common sense" and "are permitted to draw . . . such reasonable inferences as would be justified in light of their experience").

Overton v. Newton, 146 F. Supp. 2d 267, 278 (E.D.N.Y. 2001), *rev'd on other grounds*, 295 F.3d 270 (2d Cir. 2002).

Two Courts of Appeals — the Ninth and Eleventh Circuits — have expressly rejected the "strong likelihood" standard on the ground that it imposes a higher burden than *Batson*'s "inference" requirement. In *Wade v. Terhune*, the Ninth Circuit held that the "strong likelihood" standard, as interpreted by California courts following *People v. Bernard*, 27 Cal. App.

[22] *See supra* § A.3. Moreover, this interpretation of the "inference" standard goes against well-settled Title VII law, as discussed *infra*, in § B.3.

4th 458 (Ct. App. 1994), "does not satisfy the constitutional requirement laid down in *Batson*" and applies "a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." 202 F. 3d at 1192.[23] In *King v. Moore*, 196 F.3d 1327, 1334 (11th Cir. 1999), the Eleventh Circuit rejected the standard applied by the trial court, which had found no *prima facie* showing of discrimination in the exercise of peremptory challenges by applying the test in *Neil v. State*, 457 So. 2d 481 (Fla. 1984), a decision that, like *Wheeler*, required a showing of a "strong likelihood" of discrimination at the *prima facie* stage.[24] (The Eleventh Circuit ultimately ruled in

[23] *Accord, e.g., Cooperwood v. Cambra*, 245 F.3d 1042, 1046-47 (9th Cir. 2001); *Birdine v. Hubbard*, No. C-99-037-MJJ, 2000 WL 1229112 at *4 n.2 (N.D. Cal. Aug. 21, 2000) ("[T]he 'strong likelihood' standard is not the correct standard for discriminatory jury challenges; rather, defendants need only raise an inference of discrimination") (following *Wade*).

[24] In *King*, the Eleventh Circuit reasoned that "*Neil*'s standard for a prima facie case . . . is higher than *Batson*'s: *Neil* requires the party opposing a strike to point to facts establishing a 'strong likelihood' that the strike had racial motives[, while] *Batson*, on the other hand, requires the party merely to raise an inference of improper motive." *Id.* at 1334. On the basis of this reasoning, the Eleventh Circuit re-examined the state court determination under "the more relaxed standard of *Batson*." *Id.*

After *Batson* was decided, the Florida Supreme Court itself revisited the issue. Although the Court did not expressly overrule *Neil*, in *State v. Slappy*, 522 So. 2d 18, 20-21 (Fla. 1988), the Florida Supreme Court substantially relaxed its definition of the *prima facie* standard to bring it in line with *Batson*:

> Recognizing, as did *Batson*, that peremptory challenges permit "those to discriminate who are of a mind to discriminate," [*Batson*,] 476 U.S. at 96, 106 S. Ct. at 1723, we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination.

King v. Moore that under the proper *Batson* standard, the defense had not established a *prima facie* case.)

The "strong likelihood" language of *Wheeler* caused confusion among intermediate appellate courts about the appropriate standard when prosecutors' use of peremptory strikes was challenged, both before and after *Batson*.[25] In *People v. Fuller*, 136 Cal. App. 3d 403 (Ct. App. 1982) the court recognized that *Wheeler* included both "inference" and "strong likelihood" language but held that a defendant need only show "a reasonable inference of group bias" to establish the *prima facie* case. *Id.* at 423. Twelve years later, post-*Batson*, another California appellate court reached the opposite conclusion from *Fuller*. *See People v. Bernard*, 27 Cal. App. 4th at 465 (rejecting "a reduction of the *prima facie* standard to a 'reasonable inference' test").

In a series of decisions spanning the decade preceding Mr. Johnson's trial, the California Supreme Court repeatedly applied the words "strong likelihood" as the standard for establishing a *prima facie* case, while omitting any reference to the "reasonable inference" standard.[26] Finally, after the Ninth

Slappy, 522 So. 2d at 22; *see also Bryant v. State*, 565 So. 2d 1298, 1300 (Fla. 1990).

[25]Unlike the Florida Supreme Court, *see supra* note 24, the California Supreme Court never abandoned the "strong likelihood" language after this Court's decision in *Batson*.

[26] *See, e.g., People v. Welch*, 20 Cal. 4th 701, 745 (1999); *People v. Williams*, 16 Cal. 4th 635, 663-64 (1997); *People v. Mayfield*, 14 Cal. 4th 668, 723 (1997); *People v. Arias*, 13 Cal. 4th 92, 134-35 (1996); *People v. Davenport*, 11 Cal. 4th 1171, 1199-1200 (1995); *People v. Crittenden*, 9 Cal. 4th 83, 115 (1994); *People v. Turner*, 8 Cal. 4th 137, 164-65 (1994); *People v. Garceau*, 6 Cal. 4th 140, 171 (1993); *People v. Montiel*, 5 Cal. 4th 877, 909 (1993); *People v. Howard*, 1 Cal. 4th 1132, 1153-54 (1992); *People v. Fuentes*, 54 Cal. 3d 707, 714 (1991); *People v. Bittaker*, 48 Cal. 3d 1046, 1092 (1989). To the extent that California courts perceived

Circuit's decision in *Wade v. Terhune*, the California Supreme Court again revisited the issue of the compatibility of the two standards articulated in *Wheeler*, and concluded that, contrary to the appellate court's holding in *Bernard*, "reasonable inference" and "strong likelihood" were synonymous. *See People v. Box*, 23 Cal. 4th 1153, 1188 n.7 (2000).

Until *Box*, no opinion of the California Supreme Court had clearly asserted that the two incongruent standards should be interpreted as synonyms. In this case, the very fact that the trial court applied only the "strong likelihood" standard to reject Mr. Johnson's *Wheeler* claim suggests that the trial court applied the higher of the two standards, at least as they were understood, pre-*Box*, to be distinct.

2. Experience under the California Rule Demonstrates the Gulf between the California Supreme Court Formulation and the Requirements for Showing a *Prima Facie* Case under *Batson*

The California courts' tortured interpretation of the *prima facie* standard of *Wheeler* has not only led to inconsistent applications of California cases. It has also produced results that are irreconcilable with *Batson*. In numerous pre-*Box* cases, both before and after *Bernard* was decided, the California Supreme Court applied a rule that evidence sufficient to "raise an inference" of discrimination was insufficient to establish a *prima facie* case. *See People v. Sanders*, 51 Cal. 3d 471, 500-01 (1990) (concluding that even though the prosecution's "removal of all members of a certain group may give rise to an inference of impropriety," the defendant still "failed to

the two standards as inconsistent after *Fuller* and *Bernard*, the repeated application of the "strong likelihood" standard, without reference to the "reasonable inference" language, acted as an endorsement of the former and reinforced the impression that a showing of a "reasonable inference" of discrimination was insufficient to establish a *prima facie* case under *Wheeler*.

demonstrate a strong likelihood" of discrimination and therefore no *prima facie* case had been established); *see also People v. Howard*, 1 Cal. 4th 1132, 1154, 1156 (1992) (trial court did not err in finding no *prima facie* case; defendant must show "from all the circumstances in the case . . . a *strong likelihood*" of discrimination, and "although the removal of all members of a certain group may give rise to an inference of impropriety, especially when the defendant belongs to the same group, the inference is not conclusive") (citing *Sanders*, 51 Cal. 3d at 500) (emphasis in original); *see also People v. Crittenden*, 9 Cal. 4th 83, 119 (1994) (citing *People v. Howard*, 1 Cal. 4th at 1156; *People v. Sanders*, 51 Cal. 3d at 500).

In short, in several cases prior to Mr. Johnson's trial in 1998, the California Supreme Court had indicated that a demonstration of an "inference of impropriety" was not "dispositive" of a *prima facie* case. This approach is patently inconsistent with *Batson*, which requires only that the opponent of the peremptory strike demonstrate that an "inference" of discrimination arises from a consideration of all of the relevant circumstances in order to shift the burden to the proponent to articulate a nondiscriminatory reason for the strike.

3. The California Supreme Court Misunderstood this Court's Reference to Title VII in *Batson* and Relied Upon a Wholly Mistaken Interpretation of Title VII's Requirements for Making Out a *Prima Facie* Case

The California Supreme Court interprets *Batson*'s discussion of a number of this Court's Title VII decisions, along with WIGMORE ON EVIDENCE, as authority for its conclusion that "*Batson* permits a court to require the objector to present, not merely 'some evidence' permitting the inference, but 'strong evidence' that makes discriminatory intent more likely than not if the challenges are not explained." *Johnson*, 30 Cal. 4th at 1316. Neither supports this conclusion.

This Court's Title VII jurisprudence is quite to the contrary. Nowhere in any of this Court's discussion of the standards for a *prima facie* case is there any endorsement of a "strong evidence" test. Rather, this Court's Title VII decisions universally recognize, like *Batson*, that what is required to make out a *prima facie* case is evidence showing circumstances that give rise to an inference of discrimination. *E.g.*, *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected *under circumstances which give rise to an inference of unlawful discrimination*.") (emphasis added).[27] The Court has described the necessary showing as "not onerous," *id.*, and as "minimal," *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

Nor do this Court's Title VII cases support the California Supreme Court's view that evidence sufficient to draw an inference of discrimination, as compared to that needed to create a presumption, is the "lower of the two burdens."[28]

[27] *See also* 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 16 and n.46 (3d ed. 1976) ("The central inquiry in evaluating whether plaintiffs have met their initial burden is whether the circumstantial evidence presented is sufficient to create an inference (*i.e.*, a rebuttable presumption) that a basis for an employment-related decision was an illegal criterion.") [citing *Byrd v. Roadway Express*, 687 F.2d 85, 87 n.3 (5th Cir. 1982) (purpose of *prima facie* showing is to identify actions taken by employer from which discrimination can be inferred) and *Halsell v. Kimberly Clark Corp.*, 683 F.2d 285, 289 (8th Cir. 1982) (to establish prima facie case, plaintiff must produce evidence supporting inference of discrimination.)].

[28] In describing this Court's use of the term "*prima facie* case," the California Supreme Court interpreted *Burdine* as defining "*prima facie*" to require a greater evidentiary burden to shift the burden of production to defendant than is required for drawing an inference of discrimination. 30 Cal. 4th at 1315-16.

Neither *Burdine*, 450 U.S. at 254 n.7, (upon which the California Court specifically relies), nor any of this Court's other Title VII cases, requires a higher evidentiary burden for creation of a presumption than the quantum of evidence necessary to permit an inference of discrimination. Footnote 7 in *Burdine* is a description of the varying historical uses of the term "*prima facie* case" to refer to two different situations, one involving a presumption and one not. It is not an interpretation of Title VII law. Title VII creates no dichotomy between evidence sufficient to permit an inference of discrimination and evidence sufficient for a presumption. Rather, evidence sufficient to permit the drawing of an inference is all that is required for the creation of the presumption, and *Burdine*, 450 U.S. at 254 n.8, states expressly that "the word 'presumption' properly used refers only to a device for allocating the production burden" (citations omitted).[29]

The California Court uses the term "presumption" to indicate much more than a device to shift a production burden, but as a rule requiring that a *prima facie* case is established only through evidence that persuades the trier of fact on the ultimate issue of discrimination — a burden much higher than this Court's Title VII jurisprudence requires.[30]

Nor does the language cited from WIGMORE ON EVIDENCE

[29] As this Court noted in *Hicks*, "the McDonnell-Douglas presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case. . . . In this regard, it operates like all presumptions, as described in Federal Rules of Evidence 301: 'In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.'" *Hicks*, 509 U.S. at 506-07.

[30] See *supra* pp. 18-20 & nn.27, 29.

support the California Supreme Court's "strong evidence" requirement. In the section of WIGMORE relied upon by the California Supreme Court (9 WIGMORE ON EVIDENCE, § 2494 (3d ed. 1940)), Wigmore simply notes that historically, one of the uses of the term "*prima facie*" has been to describe the situation where a party with the burden of proof, because of *either* a presumption or by a general mass of "strong evidence," is entitled to judgment if his opponent produces no evidence. Nowhere does Wigmore state that "strong evidence" is a prerequisite to the creation of the presumption. Nor does this Court, in its citation to WIGMORE in *Burdine*, impose such an evidentiary burden.

This Court's minimal burden for showing a prima facie case in Title VII cases is entirely appropriate in light of the realities of litigating claims of racial discrimination. As this Court noted in *United States Postal Serv. v. Aikens*, 460 U.S. 711, 715 (1983), the *McDonnell-Douglas* standard is a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," [quoting *Furnco*, 438 U.S. at 577 (1978)] and only after the three-stage process outlined in *McDonnell-Douglas* does the trier of fact "ha[ve] before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff'" [quoting *Burdine*, 450 U.S. at 253]. A higher burden at the first stage for establishing a *prima facie* case would effectively deny the trier of fact evidence that is critical to assess the issue of discrimination. See discussion *infra* § C.2.

C. The Approach of the California Supreme Court is Inadequate to Fulfill the Guarantees of the Fourteenth Amendment

1. Petitioner has Established a *Prima Facie* Case of Discrimination

In this case, Petitioner has clearly presented sufficient evidence from which to infer that the state's peremptory challenges, if unexplained, were based on race. The record demonstrates that after the challenges for cause, three African-American potential jurors — Clodette Turner, Sara Edwards and Ruby Lanere — remained available for service on Petitioner's jury. The state, however, used its peremptory challenges to exclude *all three* of these potential jurors. The circumstances surrounding the state's exercise of these peremptory challenges suggest that the strikes were racially motivated.

First, the state used its peremptory challenges to exclude *all* African-American potential jurors from service on Petitioner's jury. As this Court has noted, "[p]roof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination.'" *Batson*, 476 U.S. at 94-95 (quoting *Hernandez v. Texas*, 347 U.S. 475, 482 (1954)). Furthermore, in several federal Circuits, this fact *alone* is sufficient to establish a prima facie case of discrimination.[31]

[31] *See, e.g., Harris v. Kuhlmann*, 346 F.3d 330, 346 (2d Cir. 2003) (*prima facie* case of discrimination established "in highlighting a 100% pattern of the use of peremptory strikes against prospective black jurors"); *Mahaffey v. Page*, 162 F.3d at 484 (7th Cir. 1998) (pattern raising inference of discrimination "plainly is evident in the State's juror challenges here, where the prosecutor excused each and every African-American member of the jury venire"); *McCain v. Gramley*, 96 F.3d 288, 292 (7th Cir. 1996) (inference of discrimination may be drawn "where there are only a few members of a racial group on the venire panel and one party strikes each one of them"), *cert. denied*, 520 U.S. 1147 (1997); *United States v. Sowa*, 34 F.3d at 452 (in challenge to use of peremptory challenges by defense counsel, "[t]he government easily made its *prima facie* case that the peremptory challenges were motivated *by race;* each and every black venireperson was challenged").

Second, the prosecutor used a disproportionate number of his peremptory challenges to exclude African-American potential jurors. Specifically, the prosecutor used 25 percent of his challenges (3 of 12) to exclude African-American jurors even though such jurors represented less than 7.5 percent (3 of 40) of the qualified jurors passed for cause. This fact also suggests that the prosecutor's strikes were racially motivated. *See Hernandez v. New York*, 500 U.S. 352, 362 (1991).[32]

Third, although it had the opportunity to do so, the state elected not to ask questions of any of the African-American potential jurors before exercising its peremptory challenges. *See* JA at 20, 23-24, 31. This pattern of non-inquiry also supports an inference of discrimination, *see Batson*, 476 U.S. at 97, because it suggests an apparent lack of interest on the part of the prosecutor in any characteristic of the struck jurors other than their race. This failure was particularly significant in the case of Ms. Turner, who was excused without inquiry of any kind despite the fact that during *voir dire* by the trial court, she offered answers that indicated she might be inclined to favor the prosecution over the defense.[33]

[32] *See also Williams v. Woodford*, 306 F.3d 665, 682 (9th Cir. 2002), *amended opinion*, 384 F.3d 567, 584 (9th Cir. 2004) ("Statistical facts like a high proportion of African-Americans struck and a disproportionate rate of strikes against African- Americans can establish a pattern of exclusion on the basis of race that gives rise to a *prima facie Batson* violation."), *rehearing and rehearing en banc denied*, 2005 WL 237646 (9th Cir. Feb. 2, 2005).

[33] *See* JA at 19 (Ms. Turner had been the victim of a crime). The probative value of the failure to *voir dire* the African-American venirepersons is not neutralized by the prosecutor's failure to question non-minority individuals on the venire, *see Johnson*, 30 Cal. 4th at 1328; moreover, such an approach would create the tactical opportunity for a prosecutor intent on excluding African Americans from a jury to mask his motives by remaining silent during *voir dire*.

Finally, the offense at issue involved a black defendant and a victim who was the child of a white woman. The likelihood that peremptory challenges will be exercised in a racially discriminatory manner is significantly increased when the crime is of an interracial nature. This, too, is a circumstance recognized by the federal courts as supporting an inference of discrimination sufficient to establish a prima facie case under *Batson*.[34]

Together, these factors constitute ample evidence from which to infer that the state's peremptory challenges were based on race. Petitioner, therefore, more than adequately set forth a *prima facie* case of discrimination under *Batson*.

2. The California Supreme Court's *Prima Facie* Case Requirement Shields, Rather than Reveals and Corrects, Discriminatory Use of Peremptory Challenges by Prosecutors

Although it characterized many of the facts set forth in the

[34] *See, e.g., Mahaffey v. Page*, 162 F.3d at 484 ("And lest we forget, the crimes at issue in this case were obviously racially sensitive — Mahaffey, a young African-American male from Chicago's south side, was charged with murdering a white couple on the North side, and with attempting to murder their young son. This is therefore a case in which the racial composition of the jury could potentially be a factor in how the jury might respond to Mahaffey's defense at trial, as well as to his arguments in mitigation at the capital sentencing phase."); *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993) (taking into account that defendant was charged with a violent offense against a white victim in finding a *prima facie* case); *Williams v. Chrans*, 945 F.2d 926, 944 (7th Cir. 1991) ("In a case where the defendant is black and the victim is white, we recognize, at the prima facie stage of establishing a *Batson* claim, that there is a real possibility that the prosecution, in its efforts to procure a conviction, will use its challenges to secure as many white jurors as possible in order to enlist any racial fears or hatred those white jurors might possess."), *cert. denied*, 505 U.S. 1208 (1992).

preceding subsection as "highly relevant," *Johnson*, 30 Cal. 4th at 1326, "troubling," *id.*, and "warrant[ing of] careful scrutiny," *id.*, the California Supreme Court nonetheless concluded that Petitioner had failed to present sufficient evidence to establish a *prima facie* case of discrimination, *id.* at 1328. Thus, the trial prosecutor was never required to proffer race-neutral reasons for his peremptory challenges, Petitioner was never given the opportunity to demonstrate that such explanations were pretextual, and no court has had the opportunity to decide whether the strikes were actually discriminatory. By conflating the *prima facie* case with the ultimate burden of proof, the California standard substantially undermines what *Batson* was designed to achieve, an efficient and reliable system for determining whether peremptory challenges are tainted by racial discrimination. *See Hernandez v. New York*, 500 U.S. at 358-59. Instead of facilitating the discovery of unlawful racial discrimination, the California standard improperly leaves "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny." *Batson*, 476 U.S. at 92-93.[35] It does so in at least three ways:

First, the California rule places the defendant at a substantial evidentiary disadvantage. As this Court has made clear (and the reported cases outside of California confirm), the decision whether discrimination has occurred is normally made at the third stage of the *Batson* analysis, and not before.[36] It is at that stage that a court examines the totality of the

[35] Because California's interpretation of *Batson* places such a heavy burden on defendants at the first step of the inquiry, California prosecutors are less frequently required to justify their strikes, California defendants are less likely to secure judicial findings of discrimination, and California prosecutors who are "of a mind to discriminate," *Batson*, 476 U.S. at 80, are given greater incentive and opportunity to discriminate, increasing the odds that a criminal defendant may be tried by an unconstitutionally constituted jury.

[36] See *supra* pp. 6-7.

circumstances to determine the plausibility of whatever explanation has been offered for the disputed peremptory challenges. *Purkett v. Elem*. Under California's approach, by contrast, the defendant must *prove* discrimination before anyone knows the purported basis on which the peremptory challenges have been made. Instead of becoming a basis for further inquiry, the *prima facie* case serves both as the effective point of decision and as a barrier to further probative evidence on the question.

Even worse, the defendant is required not only to mount the initial hurdle of offering "strong evidence" of discrimination, but inquiry into the prosecutor's purported justification for a strike is further insulated from scrutiny by allowing the trial judge, as here, to *hypothesize* possible neutral explanations for the peremptory challenges and then to rely on those hypotheses in evaluating whether a *prima facie* case has been established.[37] This testing of the defendant's evidence against hypothetical bases for a strike makes clear that the determination of discrimination occurs before the prosecutor is required to reveal a basis for the challenge. It also imposes a much more demanding standard for a *prima facie* case than *Batson* requires for the Stage 3 determination whether discrimination occurred. Under *Batson*, the court must determine whether the evidence demonstrates that the reason for the strike was discrimination — not whether there is any theoretically neutral basis on which a challenge might have been made.[38] A record of proceedings to empanel a jury will

[37] In this case, the California Supreme Court relied on the fact that the the trial court hypothesized reasons why the trial prosecutor *might have* stricken the three African-American potential jurors, *see* 30 Cal. 4th at 1325-27, in upholding the *prima facie* case ruling: "if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors, we affirm," *id.* at 1325.

[38] This Court has said that only the trial prosecutor's "legitimate reasons" for strikes are relevant to the *Batson* inquiry. *Batson*, 476 U.S. at 98 n.20. The lower federal courts have held similarly. *See Mahaffey*, 162 F.3d at 483-84 n.1 (because apparent reasons do not reflect prosecutor's actual motivation they "cannot be mistaken for the actual reasons for a [peremptory challenge.]"); *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 2001) (*en banc*) ("Apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge."); *Bui v. Haley*, 321 F.3d 1304, 1313-15 (11th Cir. 2003) (reasons offered by assistant prosecutor insufficient to rebut *prima facie* case because there was no evidence that lead prosecutor actually relied on them); *Turner v. Marshall*, 121 F.3d 1248, 1253 (9th Cir. 1997); *Hardcastle v. Horn*, No. 98-CV-3028, 2001 WL 722781 at *11 (E.D. Pa. June 27, 2001) ("While the apparent reasons gleaned from the record could have been the prosecutor's operative reasons that she might have offered in response to a *Batson* objection, no reviewing court could reasonably say that they probably were the prosecutor's reasons without engaging in sheer and unsupported speculation."), *vacated and remanded to permit State to introduce circumstantial evidence of reasons for strikes*, 368 F.3d 246 (3d Cir. 2004); *United States ex rel. Pruitt v. Page*, No. 97C-2115, 1999 WL 652035 at *7, (N.D. Ill. Aug. 20, 1999) ("To say that certain facts known about a juror *could* have supported a non-discriminatory challenge cannot establish that nondiscriminatory reasons existed.") (emphasis in original).

almost always contain hypothetical race-neutral reasons for peremptory challenges of African Americans, or members of any cognizable group. As this Court held in *Purkett*, such reasons need be only facially non-discriminatory, and virtually every single potential juror likely possesses some characteristic that could justify a peremptory challenge under this standard.[39]

[39] Under *Purkett*, an enormous variety of traits or observations has been held sufficient to meet the prosecutor's burden of production at Stage 2 of a *Batson* inquiry. *See, e.g., U.S. v. Williams*, 264 F.3d 561, 571 (5th Cir. 2001) (prosecutor's statement that venireperson smiled at defendant satisfied Stage 2 of the *Batson* analysis); *U.S v. Mahan*, 190 F.3d at 425 (prosecutor's assertion that venireperson who was divorced or widowed might harbor hostility towards men was race-neutral reason sufficient to satisfy Stage 2).

Moreover, the fact that a trial judge can hypothesize a race-neutral explanation for a peremptory challenge says nothing about whether the *prosecutor* engaged in intentional discrimination. Under *Washington v. Davis*, 426 U.S. 229 (1976), which the Court repeatedly cited in *Batson*, it is the *prosecutor*'s subjective intent that is critical, not the trial judge's. Like *Swain*, the California rule thus significantly increases the likelihood that racial discrimination will go undiscovered, both because it impedes the development of a full trial record and because it asks the wrong question at the wrong stage of the proceeding.

Second, the absence of a full trial record has obvious consequences for appellate review. On the one hand, it makes appellate review more difficult. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Court engaged in a probing review of the prosecutor's stated reasons for his peremptory challenges, even in the context of a preliminary inquiry into whether the defendant was entitled to a certificate of appealability that would enable him to pursue his *Batson* claim in further habeas proceedings. When a court is actually reviewing a *Batson* claim on the merits, a fully developed record is more essential and its absence more severely compromises the appellate process.

The absence of a fully developed record also makes reversal more likely. In *Batson* and the cases that followed it, this Court has stressed that a trial court's findings on a *Batson* claim are entitled to deference. But that deference is based on the assumption that the trial court's critical findings "largely will turn on . . . credibility," *Batson*, 476 U.S. at 98 n.21, and that "evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province." *Hernandez*, 500 U.S. at 365 (internal quotations and citations omitted). Because the California courts have front-loaded so much of *Batson* into a threshold determination

regarding the *prima facie* case, it will often be the case (as here) that no judgment will have been made about the prosecutor's credibility. An appellate court's review will be more vigorous in such circumstances, with a diminished deference to the trier of fact's determinations that is likely to produce more frequent reversals.

Third, even reversal is much less likely to lead to a fair and just result if the prosecutor has not been required to provide a contemporaneous explanation for his peremptory challenges because of an inflated standard for assessing the defendant's *prima facie* case. Indeed, this Court identified precisely that problem in less extreme circumstances in *Miller-El*, 537 U.S. at 342-43:

> As we have noted, the trial court held its *Batson* hearing two years after the *voir dire*. While the prosecutors had proffered contemporaneous race-neutral justifications for many of their peremptory strikes, the state trial court had no occasion to judge the credibility of those explanations at that time because our equal protection jurisprudence then, dictated by *Swain*, did not require it. As a result, the evidence presented to the trial court at the *Batson* hearing was subject to the usual risks of imprecision and distortion from the passage of time.

In short, California's interpretation of *Batson* increases the chances of wrong results initially, increases the chances of appeal and reversal, and increases the chances that racial discrimination will never be uncovered because of delay. If *Batson* was designed to permit "prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process," *Hernandez*, 500 U.S. at 358, the approach adopted by the California courts is far more likely to achieve the opposite result.

CONCLUSION

For all of these reasons, the California Supreme Court's ruling in this case makes it harder to empanel a jury with the "'diffused impartiality,'" *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)), necessary to protect a criminal defendant['s] "'life and liberty against race or color prejudice,'" *Strauder v. West Virginia*, 100 U.S. at 309; allows African-American jurors to be excluded because of their race in California criminal trials; thereby creates the improper impression that the State believes African Americans are unfit to serve on a petit jury, *Batson*, 476 U.S. at 87 (citing *Thiel*, 328 U.S. at 227 (Frankfurter, J., dissenting)); and "undermine[s] public confidence in the fairness of our system of justice," *Batson*, 476 U.S. at 87 (citing *Ballard v. United States*, 329 U.S. 187, 195 (1946) and *McCray v. New York*, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting)). The judgment below should be reversed.

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APPENDIX A

Interest of *Amici Curiae*

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation formed to assist African-Americans in securing their rights by the prosecution of lawsuits. LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. LDF represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered in the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), and *Georgia v. McCollum*, 505 U.S. 42 (1992).

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Northern California is one of its regional affiliates. Since its founding in 1920, the issue of race discrimination in jury selection has been a central concern of the ACLU. For that reason , the ACLU participated as *amicus curiae* in *Batson v. Kentucky*, and we have participated in most of this Court's cases interpreting its core holding.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit organization established in 1963, at the request of President Kennedy, to involve private attorneys in the effort to insure the civil rights of all Americans. Over the past 40 years, through its national office in Washington, D.C., and its eight independent local affiliate Lawyers' Committees, the organization has enlisted the services of thousands of members of the private bar in addressing the legal problems of racial minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice and law enforcement. The Lawyers' Committee has long been concerned with the issue of race discrimination in jury selection, and participated as *amicus curiae* on this issue in both *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice.